Supreme Court, U.S.
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No. 98-1917

IN THE

Supreme Court of the United States

ROBERT J. NUSSBECK,

Petitioner,

v.

PATRICIA J. NUSSBECK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COLORADO SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	iii
Opinions Below	1
Statement of The Case	1
Summary of Argument	5
Reasons for Denying the Writ	7
I. The Petition Misstates The Facts And Holdings, Thereby Distorting The Question Presented.	7
A. In light of the fact that the petitioner was ordered imprisoned for his violation of the temporary orders, rather than for his failure to pay a money judgment, his argument based upon improper imprisonment for failure to pay a money judgment is totally inapplicable.	7
B. As the Colorado Supreme Court only overruled the Colorado Court of Appeals' prohibition against cumulative entry of a judgment for past due support and a remedial contempt order, and the petitioner is not claiming that the trial court erred by entry of a remedial contempt order following entry of a judgment for past due support, there is	

Contents

Page

no basis for his argument that his conviction and imprisonment for *punitive* contempt constituted unconstitutional retroactive application of law. 8

C. The facts do not give rise to an argument against retroactive application or interpretation of a criminal statute so as to criminalize conduct retroactively. 9

II. The Record Establishes The Trial Court Made The Requisite Findings Of Petitioner's Ability To Pay When Due And Of His Conduct Offending The Dignity Of The Court. 9

Conclusion 12

TABLE OF CITED AUTHORITIES

Page

Cases:

Hicks on Behalf of Feiock v. Feiock, 485 U.S. 624 (1988) 12

In re Marriage of Woodrum, 618 P.2d 732 (Colo. App. 1980) 5, 6, 7, 8, 9

Lobb v. Hodges, 641 P.2d 310 (Colo. App. 1982) 10, 12

OPINIONS BELOW

The petition accurately reflects the opinions below; however, the opinion of the Colorado Supreme Court is reported at 974 P.2d 493, *In re Marriage of Nussbeck* (Colo. 1999).

STATEMENT OF THE CASE

The petition fails to disclose that at the November 21, 1995 Contempt Hearing, the court made extensive findings, reciting a long history of violations by the petitioner, which went back over a period of more than eight (8) years, and which had resulted in the entry of several arrearage judgments and a prior finding that the petitioner was in contempt of court for not paying court ordered maintenance and support. (Petitioner's Appendix, hereinafter "App.," 16-7). The court then imposed both remedial and punitive sanctions. The remedial sanction was that the petitioner was to be jailed until $8,000, plus another $11,753.24, and accrued interest, was paid. The punitive sanction was a ninety (90) day jail sentence, to vindicate the dignity of the court. (App. 31).

As the petition indicates, the petitioner filed for appeal to the Colorado Court of Appeals, who affirmed the remedial contempt ruling and reversed the District Court on the punitive contempt conviction. The petitioner did nothing further with the affirmance of the remedial contempt ruling.

The respondent did seek review of the punitive contempt by certiorari to the Colorado Supreme Court, who reversed the decision of the Court of Appeals. The Colorado Supreme Court held, in relevant part, as follows:

> Wife argues that the issue in the contempt proceeding was husband's failure to comply with prior orders of the court, contending in particular that she sought enforcement of the temporary orders directing the payment of $330 per month in maintenance and child support, and not merely to execute upon the 1990 Judgment. Therefore, wife claims, the fact that a written judgment was entered for amounts due and not paid under the temporary orders and the 1990 Judgment entered by operation of law pursuant to section 14-10-122, should not bar punitive contempt proceedings against husband. We agree.
>
> In the record below and before us, husband does not dispute the entry of the 1987 order, the temporary orders, directing payments of $330 per month for maintenance and child support. The 1990 Judgment was rendered *after* the entry of the temporary orders directing husband to pay the very amounts the magistrate found husband "attempt[ed] . . . to dodge." The amounts not paid under the temporary orders later became the basis for the 1990 Judgment in the amount of $13,200, which judgment husband did not appeal. Fifteen months later, after the payments for support and maintenance remained unpaid, wife filed her motion for contempt. We conclude that the temporary orders, even though the basis for a judgment by operation of law, *see* §14-10-122, continue to provide a sufficient predicate for a contempt citation.

(App.13; emphasis in original).

The Colorado Supreme Court further held, in relevant part, as follows:

> Husband also argues that he was not provided notice and that "[n]o court ever found that [he] had any ability to pay the 1990 judgment"; therefore, the punitive contempt ruling cannot stand. However, on this record, we are not so persuaded. On July 6, 1995, wife filed her Verified Motion for Punitive Contempt setting forth the necessary elements to satisfy the notice requirements. Those elements were that husband "refused to pay child support," acted in "willful violation of existing orders of the court," and that husband knew that he had the obligation to pay under the temporary orders and the 1990 Judgment. At the November 21, 1995 hearing, the magistrate, taking notice of the court file, found that husband had not complied with the court's prior orders, that husband knew of the prior orders, that husband had the ability to pay, and that those "orders for child support were not paid."
>
> Whatever comfort husband may find in the magistrate's interchangeable use of the terms "orders" and "judgment" is of no legal effect, in our view. Moreover, our reading of the magistrate's findings of November 21, 1995 causes us to conclude that there were findings of husband's ability to make the ordered payments and that husband willfully failed to make such payments in accordance with the temporary orders. The magistrate found as follows:

Well, the Court finds that as to orders, there were orders. . . . And there was [a] finding, at that time, of the ability to pay. And the Court finds that there were orders. And the Respondent was aware of the orders. And as to those two, he had the ability to comply. That was found at the time that those were entered. . . . As to the punitive, [the] Court finds the same thing. There were orders that were entered. The orders were known to the Respondent. The Respondent appealed those orders on several occasions. And the Court takes notice of its own file. . . . [I]n the Court's view, [husband's refusal] goes to the issue of wilfulness [sic] or wantonness and ability to pay. . . . So, there were some payments that were made. And that does not, in this Court's view, absolve the Respondent of his duty to pay. Court finds that these orders for child support are judgments when they are not paid. And there was nonpayment. And the record on nonpayment is so long, so much a part of the court record, previously addressed in, at least, one contempt citation with review. Respondent had been admonished in the past by this Court, specifically about his behavior and not coming forward with his payments. And the intent of the Court is to get these payments made. . . . And

> I think you've had ample opportunity to follow through with the orders of the Court. And you haven't done that. And your attempts are, and have been, to dodge the order, to not pay, to make it difficult for the Petitioner to collect child support. And based on those issues, I find that punitive sanction is appropriate.

(App. 15-7).

The relevant law set forth in the earlier case of *In re Marriage of Woodrum*, 618 P.2d 732, 735 (Colo. App. 1980) was that "entry of a judgment for past due support payments is an exclusive remedy; such judgments and *remedial* contempt orders are alternative, not cumulative, remedies." (Emphasis added). Contrary to the petition, *Woodrum* did *not* hold that "the failure to pay a money judgment cannot provide the basis for the imposition of either remedial or punitive contempt."

SUMMARY OF ARGUMENT

The petitioner's entire argument under the first question presented relies upon the Due Process Clause's prohibition against applying or interpreting a criminal statute in a retroactive manner so as to criminalize conduct retroactively. As a basis for his legal argument, the petitioner argues that he was ordered imprisoned by way of a punitive contempt sanction for failing to pay a money judgment. He further argues in support of his legal argument that the Colorado Court of Appeals, via its opinion in *In re Marriage of Woodrum*, had a longstanding prohibition

against imprisonment for failure to pay a money judgment. The petitioner then argues that the Colorado Supreme Court overruled this longstanding prohibition and, therefore, retroactively criminalized his failure to pay a money judgment.

However, the facts and holdings upon which the petitioner relies in support of his legal argument are misstated, thereby distorting the question presented. Contrary to the assertions of the petitioner, he was not ordered imprisoned by way of punitive contempt for failing to pay a money judgment, but was ordered imprisoned by way of a punitive contempt sanction for his violation of temporary orders, which imprisonment was to vindicate the dignity of the court. Contrary to the assertions of the petitioner, the Colorado Court of Appeals' *In re Marriage of Woodrum* opinion contains no prohibition against imprisonment for failure to pay a money judgment. Since no such alleged longstanding prohibition existed, the Colorado Supreme Court could not and did not overrule such prohibition. Therefore, this case has no facts which give rise to an argument against retroactive application or interpretation of a criminal statute so as to criminalize conduct retroactively.

As such, the actual facts and holdings do not support the first question presented, nor the argument underlying same.

The record establishes that the trial court made sufficient findings of the petitioner's ability to pay the court ordered support when due. It also establishes that the trial court made an explicit finding that the petitioner's conduct offended the dignity of the court. Therefore, the record,

itself, disproves petitioner's argument under his second question presented.

REASONS FOR DENYING THE WRIT

I. THE PETITION MISSTATES THE FACTS AND HOLDINGS, THEREBY DISTORTING THE QUESTION PRESENTED.

A. In light of the fact that the petitioner was ordered imprisoned for his violation of the temporary orders, rather than for his failure to pay a money judgment, his argument based upon improper imprisonment for failure to pay a money judgment is totally inapplicable.

As the Colorado Supreme Court noted, "It is those orders, the temporary orders, entered in 1987 which continued in effect beyond the date judgment was entered, *not the 1990 Judgment*, which was the predicate for the punitive contempt proceedings and the judgment of contempt now under review." (App. 14; emphasis added). Thus, the petitioner was not, as he alleges, ordered imprisoned for failure to pay a money judgment. Therefore, his argument based on this improper predicate is inapplicable to the actual facts presented.

Instead, as established by Appendix 14, the petitioner was ordered imprisoned for his violation of the temporary orders, which imprisonment was to vindicate the dignity of the court. This very imprisonment is *permitted* by the case to which petitioner cites. *See In re Marriage of Woodrum*, 618 P.2d 732, 735-36 (Colo. App. 1980).

B. As the Colorado Supreme Court only overruled the Colorado Court of Appeals' prohibition against cumulative entry of a judgment for past due support and a remedial contempt order, and the petitioner is not claiming that the trial court erred by entry of a remedial contempt order following entry of a judgment for past due support, there is no basis for his argument that his conviction and imprisonment for *punitive* contempt constituted unconstitutional retroactive application of law.

The thrust of petitioner's argument is that the Colorado Supreme Court overruled the Colorado Court of Appeals' longstanding prohibition, reflected within *In re Marriage of Woodrum*, against the imprisonment of a party for failure to pay a money judgment. However, *Woodrum* never so held, as reflected within the *Woodrum* reported opinion at 618 P.2d 732, 735-36 (Colo. App. 1980). Therefore, the petitioner's argument based on this improper predicate is inapplicable to the actual facts presented.

The longstanding prohibition reflected within *Woodrum*, and overruled by the Colorado Supreme Court, was against cumulative entry of a judgment for past due support payments and entry of a *remedial* contempt order. (App. 18-9); *In re Marriage of Woodrum*, 618 P.2d 732, 735 (Colo. App. 1980) (holding "entry of a judgment for past due support payments is an exclusive remedy; such judgments and *remedial* contempt orders are alternative, not cumulative, remedies."). However, the petitioner is not, via his current Petition for Writ of Certiorari, challenging the entry of a remedial contempt order following entry of a judgment, nor can he. The Colorado Court of Appeals affirmed the remedial contempt ruling (App. 27-9) and the

petitioner did nothing further with the affirmance. As such, he failed to exhaust his state remedies.

C. The facts do not give rise to an argument against retroactive application or interpretation of a criminal statute so as to criminalize conduct retroactively.

Throughout his petition, the petitioner cites cases prohibiting *ex post facto* laws. However, for such cases to apply, the facts must establish that retroactive application or interpretation of a criminal statute resulted in criminalizing petitioner's conduct retroactively. Because the petitioner was ordered incarcerated via a punitive contempt sanction for his violation of temporary orders, which imprisonment was to vindicate the dignity of the court, and because such imprisonment is consistent with the "longstanding" holdings reflected in *In re Marriage of Woodrum*, there are no facts which give rise to petitioner's argument against *ex post facto* laws. As such, the respondent cannot "rebut" or argue against inapplicable case law.

II. THE RECORD ESTABLISHES THE TRIAL COURT MADE THE REQUISITE FINDINGS OF PETITIONER'S ABILITY TO PAY WHEN DUE AND OF HIS CONDUCT OFFENDING THE DIGNITY OF THE COURT.

In support of his first question presented, the petitioner relies heavily upon *In re Marriage of Woodrum*, 618 P.2d 732 (Colo. App. 1980). Said case affirms "[t]he power of the trial court to punish the husband for violating its order by a penal contempt sentence, imposed to vindicate the dignity of the court." *Id.* at 735. In the case *sub judice*, the

Colorado Supreme Court simply affirmed the trial court's use of its power to punish the petitioner for violating the temporary orders by a penal contempt sentence, imposed "to vindicate the dignity of . . . the court for [his] continual obstruction of the orders of the court." (App. 15).

The petition alleges that there was no evidence of petitioner's ability to pay the support payments when due under the orders. The same argument was advanced by the petitioner before the Colorado Supreme Court. (App. 15). However, as noted by the Supreme Court, there was sufficient evidence of the petitioner's ability to make the payments when due, to wit:

> Well, the Court finds that as to orders, there were orders. . . . *And there was [a] finding, at that time, of the ability to pay.* And the Court finds that there were orders. And the Respondent was aware of the orders. *And as to those two, he had the ability to comply. That was found at the time that those were entered.* . . . And the Court takes notice of its own file. . . .

(App. 15-7; emphasis added).

The petition points out that a prerequisite to punitive contempt is "an explicit finding by the trial court that the contemnor's conduct offends the dignity of the court." (Petition p.14 (*citing Lobb v. Hodges*, 641 P.2d 310, 311 (Colo. App. 1982))). The trial court clearly satisfied this prerequisite, as established by the following findings recited by the Colorado Supreme Court:

> On the punitive portion, you're ordered for 90 days straight time in jail. And that's to vindicate

the dignity of . . . the court for your continual obstruction of the orders of the court, . . . costing the court additional time and effort by your efforts.

. . .

Well, the Court finds that as to orders, there were orders. . . . And there was [a] finding, at that time, of the ability to pay. And the Court finds that there were orders. And the Respondent was aware of the orders. And as to those two, he had the ability to comply. That was found at the time that those were entered. . . . As to the punitive, [the] Court finds the same thing. There were orders that were entered. The orders were known to the Respondent. The Respondent appealed those orders on several occasions. And the Court takes notice of its own file. . . . [I]n the Court's view, [husband's refusal] goes to the issue of wilfulness [sic] or wantonness and ability to pay. . . . So, there were some payments that were made. And that does not, in this Court's view, absolve the Respondent of his duty to pay. Court finds that these orders for child support are judgments when they are not paid. And there was nonpayment. And the record on nonpayment is so long, so much a part of the court record, previously addressed in, at least, one contempt citation with review. Respondent had been admonished in the past by this Court, specifically about his behavior and not coming forward with his payments. And the intent of the Court is to get these payments made. . . . And I think you've

> had ample opportunity to follow through with the orders of the Court. And you haven't done that. And your attempts are, and have been, to dodge the order, to not pay, to make it difficult for the Petitioner to collect child support. And based on those issues, I find that punitive sanction is appropriate.

(App. 15-17). Such noted behavior of the petitioner amounts to much more than "the mere existence of an unpaid judgment," as alleged by the petitioner. Such also satisfies the case law prerequisites espoused by petitioner, to wit: Punitive contempt was not merely presumed and the contemnor's conduct was explicitly found to offend the dignity of the court. (Petition p.14 (*citing Hicks on Behalf of Feiock v. Feiock*, 485 U.S. 624 (1988); *Lobb v. Hodges*, 641 P.2d 310, 311 (Colo. App. 1982))).

CONCLUSION

For the reasons given above, the petition should be denied.

Respectfully submitted,

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